UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)

MINNESOTA LAWYERS MUTUAL INSURANCE COMPANY	)	
Plaintiff,	)	
v.	)	**Case No.: 1:08cv1020 LO/TCB**
ANTONELLI, TERRY, STOUT & KRAUS, LLP *et al.*,	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM OF LAW
OPPOSING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Defendants Antonelli, Terry, Stout & Kraus, LLP (the "Antonelli law firm") and Donald E. Stout ("Stout") (collectively, the "Insureds") submit this memorandum of law in opposition to the plaintiff Minnesota Lawyers Mutual Insurance Company's ("MLM") motion for summary judgment.

I. Introduction

MLM seeks a declaration that it has no duty to defend the Insureds in a Florida state court action, *Ferguson, et al. v. Stout, et al.*, Case No. 08-09767CA40 ("*Ferguson* action"). The *Ferguson* action includes allegations that, if true (something that the Antonelli law firm and Stout vigorously deny), would create liabilities directly covered by MLM's policy. It follows that, under Virginia law, as demonstrated in Defendants'

Memorandum Supporting Their Motion for Summary Judgment (Dock't No. 36) ("Insureds' Br.")[1], MLM has a duty to defend.

Attempting to avoid this obligation, MLM presents a convoluted reading of the *Ferguson* plaintiffs' allegations to support its contention that two policy exclusions appear to apply. The attempt fails. MLM cannot avoid the fact that among the multiple allegations of the *Ferguson* complaint are allegations seeking to recover from MLM's Insureds because they allegedly provided the plaintiffs (or their predecessors) with "legal advice" and "devised a legal strategy" to protect these *Ferguson* plaintiffs' interests in certain patents, and that, according to the *Ferguson* plaintiffs, when followed, this advice and strategy resulted in the loss of that interest. That *is* an alleged liability "resulting from the rendering or failing to render PROFESSIONAL SERVICES while engaged in the private practice of law" that falls squarely within the coverage MLM agreed to provide. *See* Affidavit of Brian J. Gerling In Support of Defendants' Motion for Summary Judgment, ("Gerling Aff.") Ex. E at Form MLM-2000 (4-05) (p. 1 of 7).

Under Virginia law, it matters not whether there may be other allegations that, if true, might create other liabilities that fall within the exclusions upon which MLM relies. Rather, there is a duty to defend if there are *any* allegations that may be potentially covered for which the Insureds could be found liable. It follows that the *Ferguson* plaintiffs' allegation that they suffered a loss as a result of following a legal strategy purportedly devised by the Insureds creates a duty to defend. MLM's motion should be denied.

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[1] The Insureds incorporate their motion for summary judgment, including attachments, herein by reference. As shown therein, under Virginia law, if there is even a single allegation that, if true, would create liability covered by MLM's policy, then MLM has a duty to defend. *See, e.g., Penn-Am. Ins. Co. v. Mapp,* 461 F. Supp. 2d 442, 456 (E.D. Va. 2006) *appeal dismissed* 521 F.3d 290 (4th Cir. 2008).

II. Statement of Material Facts In Dispute

Pursuant to Local Civil Rule 56(B), the Insureds respond to MLM's Material Facts as to Which There is No Dispute ("MLM Statement") as follows[2]:

1. The Insureds state that MLM issued a professional liability policy number 7405 06 (the "Policy") to Antonelli, Terry, Stout & Kraus LLP. To the extent that MLM seeks to characterize the terms, conditions, definitions, or limits of the Policy in its statement, or is otherwise inconsistent with the language of its Policy, the Insureds state that they dispute any such purported fact.

2. The Insureds admit that each were named as defendants in a second amended complaint in a pending action in Florida state court, *Ferguson, et al. v. Stout, et al.*, Case No. 08-09767CA40. The Insureds were also named in a third amended complaint as well. *See* Gerling Aff. Ex. C. This third amended complaint contains no claim for fraud or civil conspiracy. To the extent that MLM seeks to characterize the allegations in the *Ferguson* action, the Insureds state that they dispute any such purported fact.

3. With regard to paragraphs 3-7 of the MLM Statement, all of which concern the MLM Policy, the Insureds state that MLM issued Policy 7405 06 to Antonelli, Terry, Stout & Kraus LLP. To the extent that MLM seeks to characterize the terms, conditions, definitions, or limits of the Policy in its statement, or is otherwise

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[2] For a statement of the material facts and further support for the Insureds' dispute of MLM's statement, the Insureds respectfully refer to their motion for summary judgment and its supporting papers.

inconsistent with the language or intent of its Policy, the Insureds state that they dispute any such purported fact.

Allegations of the Andros Complaint

4. With regard to paragraph 8, subparagraphs (a)-(g), of the MLM Statement, all of which concern the "Andros Complaint," the Insureds state that what is characterized as the "Andros Complaint" appears to correspond to what has been characterized as the "state suit" at page 2 of MLM's Memorandum of Law In Support of Its Motion for Summary judgment, which is defined as the second amended complaint that was filed in a pending action in Florida state court, *Ferguson, et al. v. Stout, et al.*, Case No. 08-09767CA40. To the extent that is not the case, the Insureds deny these allegations. To the extent that paragraph 8 and subparagraphs (a)-(g) do in fact correspond to the second amended complaint that was filed in a pending action in Florida state court, *Ferguson, et al. v. Stout, et al.*, Case No. 08-09767CA40, the Insureds state that the second amended complaint in a pending action in Florida state court, *Ferguson, et al. v. Stout, et al.*, Case No. 08-09767CA40, speaks for itself and the Insureds refer to the second amended complaint in its entirety for its contents. Further, as noted above, a third amended complaint has been filed in that action. To the extent that MLM seeks to characterize the allegations of the *Ferguson* action, the Insureds state that they dispute any such purported fact.

Notice of Claim to MLM, and MLM Reservation of Rights

5. With regard to paragraph 9 of the MLM Statement, the Insureds state that Scott Swirling sent notice of the second amended complaint in the Florida state court, *Ferguson, et al. v. Stout, et al.*, Case No. 08-09767CA40, to MLM on behalf of the

Insureds. *See* Affidavit of Scott Swirling In Support of Defendants' Motion For Summary Judgment at ¶¶ 2-3. The MLM policy covers both the Antonelli law firm and its partners, including Stout. As such, the Insureds dispute that any such notice was only on the part of the Antonelli law firm. *See* Gerling Aff., Ex. E, Form MLM-2000 (4-05) (p. 2 of 7); Swirling Aff. at ¶¶ 2-3. The Insureds further state that Stout was named as a defendant in a pending action in Florida state court, *Ferguson, et al. v. Stout, et al.*, Case No. 08-09767CA40, but disputes that notice of the claim of the *Ferguson* suit on Stout's behalf was not provided to MLM. To the extent that the allegations set forth in paragraph 9 of the MLM statement seek to characterize or otherwise suggest the purported legal effect of any such notice to MLM, the Insureds dispute any such contention.

6. With regard to paragraph 10 of the MLM Statement, the Insureds state that MLM issued a first reservation of rights letter, dated August 25, 2008, to Donald E. Stout, Esq. and Melvin Kraus, Esq., which speaks for itself. To the extent that the allegations set forth in paragraph 10 of the MLM Statement seek to characterize or otherwise suggest the purported legal effect of any such letter, the Insureds dispute any such contention. The Insureds further state that MLM issued a second reservation of rights letter, dated September 25, 2008, to counsel for the Insureds, Lon A. Berk, Esq., which speaks for itself. To the extent that the allegations set forth in paragraph 10 of the MLM Statement seek to characterize or otherwise suggest the purported legal effect of any such letter, the Insureds dispute any such contention.

7. With regard to paragraph 11 of the MLM Statement, the Insureds deny the factual allegations set forth in paragraph 11, as well as any related legal conclusion.

III. Argument

MLM misunderstands Virginia law.[3] Under Virginia law, the duty to defend is determined by the "eight corners rule." *See Mapp,* 461 F. Supp. 2d at 456 (the "Eight Corners Rule" is a combination of the "Exclusive Pleading Rule" and the "Potentiality Rule.") (citations omitted). If there is a single allegation that, if proved, would create liability covered by the Policy, there is a duty to defend the entire action. *Capitol Envtl. Servs. v. N. River Ins. Co.*, 536 F. Supp. 2d 633, 640 (E.D. Va. 2008) (the duty to defend "arises whenever the complaint [against the insured] alleges facts and circumstances, *some of which would, if proved,* fall within the risk covered by the policy") (emphasis added and citations omitted)*; see Parker, et al. v. Hartford Fire Ins. Co.*, 222 Va. 33, 35, 278 S.E.2d 803, 804 (1981) (even if the complaint alleges some allegations of non-covered conduct, if there are alleged facts and circumstances, some of which, if proved, would fall within a risk covered by the policy, the insurer has a duty to defend); *Fuisz v.*

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[3] Interestingly MLM cites to *KBS, Inc. v. Great Am. Ins. Co.*, No. 3:04cv730, 2006 WL 3538985, at *6 (E.D. Va. Dec. 7, 2006) for the proposition that it is a function of the court to construe the language of the insurance policy as written. *See* MLM Br. at 8. However, the insurance policy at issue in *KBS* contained a "duty to investigate," which, unlike the "duty to defend," is not an immediate obligation. That case therefore has no application here. MLM's position throughout this litigation, including its argument to the Fourth Circuit, *see* Gerling Aff. Ex. A at 10, and its other written statements, has been that its policy, if triggered, includes a "duty to defend." *See e.g.,* Gerling Aff. Ex. F at p. 1 ("We will provide Mr. Stout and the law firm with a defense to the complaint ....") and Ex. K at p. 1 ("At issue in this declaratory judgment action is whether [MLM] owes a duty to defend its insureds ...."). MLM's position is, even though it is wrong under Virginia law, that its defense obligation has not been triggered by the *Ferguson* allegations because such allegations are precluded in total by its policy exclusions. As such, MLM waived and is estopped from asserting any contention that its policy does not have a "duty to defend." *See, e.g., Little v. Cooke*, 274 Va. 697, 722, 652 S.E.2d 129, 144 (2007) (positions and subsequent holdings based thereon that are uncontested on appeal become "the law of the case"); *Bland v. Doubletree Hotel Downtown*, No. 3:09cv272, 2010 WL 723805, at * 3 (E.D. Va. Mar. 2, 2010) ("Judicial estoppel ... prevent[s] a party from taking a position in a judicial proceeding that is inconsistent with a stance previously taken in court.") (quoting *Zinkland v. Brown*, 478 F. 3d 634, 638 (4th Cir. 2007).

Selective Ins. Co. of Am., 61 F.3d 238, 242 (4th Cir. 1995) ("[A]n insurer is excused from its duty to defend the insured only where the complaint against the insured clearly demonstrates no basis upon which the insurer could be required to indemnify the insured under the policy."). MLM ignores this rule. By omitting material allegations, and misconstruing others, MLM reads the *Ferguson* allegations to fall within certain exclusions.[4] But whether or not the allegations might be read as MLM suggests, they can also be read as creating liability covered by MLM's Policy. *See* Insureds' Br. at 10-18. That is sufficient reason to deny MLM's motion.

A. The Ferguson Plaintiffs Allege "Professional Services" Covered By MLM's Policy.

The *Ferguson* complaint contains allegations concerning "legal advice" and "legal strategy" and seeks to impose liability on the Insureds arising out of those allegations. That potential liability falls squarely within the MLM Policy, which covers liability "resulting from the rendering or failing to render PROFESSIONAL SERVICES while engaged in the private practice of law." *See* Gerling Aff. Ex. B at ¶¶55-57 ("...according to Stout, a 'distinction' could be created under United States patent law between Telefind's paging technology ... and the Wireless Email Technology, which would be placed in a separate entity in order (Stout claimed) to protect [certain investors in Telefind] interest in the Wireless Email Technology."); *see also* Ex. B at ¶96; Ex. C at ¶¶58-60 (same); *see also* Ex. C at ¶104; *and* Gerling Aff. Ex E. at Form MLM-2000 (4-05) (p. 1 of 7). As such, the complaint includes allegations covered by MLM's policy. *See also Continental Cas. Ins. Co. v. Burton*, 795 F.2d 1187, 1190 (4th Cir. 1987) (applying Virginia law and holding that a lawyer, who had purportedly embezzled his clients' money while serving as both a lawyer and an investment adviser to his clients, rendered legal services and therefore was covered under a similar professional liability policy).

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[4] For instance, MLM mischaracterizes paragraph 96 of the second amended complaint as stating "Mr. Stout is alleged to have falsely promised that the Andros plaintiffs would share in future benefits from the technology;" *see* MLM Br. Statement of Undisputed Facts at p. 3, when in fact paragraph 96 is part of the Ferguson plaintiffs' breach of fiduciary duty claim, and alleges that "Stout served as legal counsel to Telefind ...," and that "Stout provided legal advice to Andy Andros and the Richards investors in connection with the transfer of Wireless Email Technology ...." Another example is MLM's characterization of paragraph 57 of the second amended complaint, in which MLM contends that the only allegation of this paragraph is that "Andros and the Richards Investors accepted this legal advice from Stout, subject to an understanding that they would continue to participate in any benefits associated with the Wireless Email Technology," but that paragraph then goes on to make further allegations that unequivocally trigger its policy. The remainder of paragraph 57 continues: "In accepting this advice from Stout, Plaintiffs relied on Stout as legal counsel who was purporting to represent their interests as parties who were responsible for funding and developing the Wireless Technology. [These investors] accepted Stout's legal advice under duress, and subject to the understanding that the distinction Stout was going to create [under U.S patent law] between the Wireless Email Patents and the Paging Patents was legal." Yet another example is that MLM contends that the entire *Ferguson* action can essentially be characterized as "a fraudulent plan and conspiracy to cheat the plaintiffs ... out of valuable rights to patents and technology .... Complaint ¶¶31-71." MLM Br. at 2-3. However, both the fraud and conspiracy claims have been dismissed against Mr. Stout and the Antonelli law firm.

Not able to cogently contest this point, MLM seeks to apply its policy's exclusions. But, as demonstrated below, these arguments fail as well.

B. The Business Enterprise Exclusion Does Not Bar Coverage.

1. The Exclusion Does Not Apply.

To avoid its obligations, MLM relies upon exclusion 3, which excludes coverage for:

> any CLAIM arising out of PROFESSIONAL SERVICES rendered by any INSURED in connection with any business enterprise: (a) owned in whole or part; (b) controlled directly or indirectly; or (c) managed, [b]y INSURED, and where the claimed DAMAGES resulted from conflicts of interest with the interest of any client or

> former client or with the interest of any person claiming an interest in the same or related business or enterprise.

See Gerling Aff. Ex. E (Form MLM-2000 (4-05) (p. 3 of 7)). MLM's reliance on this exclusion fails for two independently sufficient reasons. Two conditions must be met for the exclusion to apply: (1) the professional services must be rendered in connection with a business enterprise "owned," "controlled" or "managed" by the Insureds; and (2) the alleged damages must result from conflicts of interest. Neither condition is met.

First, the claims potentially covered by MLM's policy are for legal advice rendered not in connection with any entity owned, controlled or managed by the Insureds, but rendered to the *Ferguson* plaintiffs. The complaint alleges that the Insureds advised certain investors in a company named Telefind not to document certain alleged interests in patents to avoid the loss of their interest in these patents in certain bankruptcy proceedings. *See* MLM Br. at 4 (Statement of Undisputed Facts 8(c)); *see also* Gerling Aff. Ex. B at ¶¶52-57; Ex. C at ¶¶55-60. That is advice rendered to certain individuals, not to or in connection with any entity owned, managed or controlled by the Insureds. It therefore falls outside the scope of Exclusion 3.

The duty to defend can only be defeated by Exclusion 3 if the *Ferguson* plaintiffs further allege that the Insureds "owned in whole or part," "controlled directly or indirectly," or "managed" Telefind. *See Mapp*, 461 F. Supp. 2d at 456-57 (the duty to defend is determined by comparing each of the allegations against the terms of the policy to determine if any such allegations are potentially covered) (citations omitted). There are no such specific allegations. The *Ferguson* plaintiffs allege that the Antonelli law firm and Stout were mere "investors" in Telefind and purportedly provided legal advice to certain other investors. *See* Gerling Aff. Ex. B at ¶29; Ex. C at ¶32. There is no allegation concerning the form that investment may have taken and no allegation that it constituted any type of requisite ownership interest or control. As such, MLM's reliance on this exclusion fails.

Second, the alleged damages did not result from a conflict of interest. They allegedly resulted from the *Ferguson* plaintiffs following the Insureds' alleged legal advise and strategy. For Exclusion 3 to apply, the claim must be one where the damages exclusively result from the conflict of interest, not from incorrect legal advice. Exclusion 3 only applies where "the claimed DAMAGES resulted from conflicts of interest." That is not the allegation here. The *Ferguson* plaintiffs contend that their claimed damages resulted from their failure to document interests in patents based upon legal advice.

MLM' s own policy explains that:

> [Exclusion 3] applies ... only when the claimed DAMAGES resulted from conflict of interests as defined in the exclusion. *Other claims, unrelated to such conflicts of interest, are covered.*

See Gerling Aff. Ex. E (Form MLM-2003 (4-05) Exclusions B. Exclusion (3) (p. 3-4 of 8)) (emphasis added). The *Ferguson* plaintiffs contend that the legal advice and strategy not to document certain alleged interests in patents caused them to lose an interest in the patents and, consequently, their share of a $600,000,000 settlement. *See id.*; *see also* Gerling Aff. Ex. B at ¶96; Ex. C at ¶104.[5] As such, the *Ferguson* plaintiffs' claim for damages is based on incorrect legal advice allegedly provided to these plaintiffs. That claim does not concern any conflict of interest between an entity in which the Insureds had the requisite ownership or controlling interest, on the one hand, and the *Ferguson*

[5] As such, MLM's reference to the Flatt Morris Company is also of no consequence. According to the *Ferguson* plaintiffs, the purported legal advice was rendered to certain individuals, and not to Flatt Morris.

plaintiffs, on the other, that could conceivably fall within Exclusion 3. It follows that this claim for damages is that very kind of "other claim[], unrelated to such conflicts of interest, [that is] covered" under the MLM policy.

2. MLM's Interpretation Renders the Exclusion Ambiguous

There is yet another reason that MLM's reliance on Exclusion 3 fails. Under Virginia law, where policy terms have more than one meaning they must be construed so that coverage is maximized, rather than restricted. *St. Paul Fire & Marine Ins . Co. v. S.L. Nusbaum & Co.*, 227 Va. 407, 411, 316 S.E.2d 734, 735 (1984) ("Where two constructions are equally possible, that most favorable to the insured will be adopted."); *Granite State Ins. Co. v. Bottoms,* 243 Va. 228, 415 S.E.2d 131 (1992) ("Doubtful, ambiguous language in an insurance policy will be given an interpretation that grants coverage, rather than one which withholds it.") (quoting *S.L. Nusbaum*, 227 Va. at 411, 316 S.E.2d at 736); *Am. Reliance Ins. Co. v. Mitchell*, 238 Va. 543, 547, 385 S.E.2d 583, 585 (1989) (the Supreme Court of Virginia ruled that "language is ambiguous when it may be understood in more than one way or when it refers to two or more things at the same time."); *Fuisz,* 61 F.3d at 242 (when the policy terms are susceptible to more than one reasonable interpretation, then Virginia courts construe the language in favor of the insured and against the drafter-insurer).

MLM contends that an "investor" falls within the scope of policy Exclusion 3. *See* MLM Brief at p. 11 fn 4. But Exclusion 3 applies only to insureds that "own[] in whole or in part," "control directly or indirectly," or "manage[]." Investors do not fall into any of these categories. For instance, one source defines an "investor" as "a buyer of a security or other property who seeks to profit from it without exhausting the principal."

Black's Law Dictionary, Abridged 8th Ed. (2005). Someone obtaining an unsecured note from a company seeking to profit from its payment terms would be an investor, even though such a person does not "own[] in whole or in part," "control directly or indirectly" or "manage" the company. Passive investors do not fall within Exclusion 3. *See* Gerling Ex. E at Form MLM-2000 VA (4-05) (p. 3 of 7).

As drafter of its policy terms, MLM is required to make its policy exclusions clear and unambiguous. *See Mitchell*, 228 Va. at 547, 385 S.E.2d at 585 (it is "incumbent upon the insurer to employ exclusionary language that is clear and unambiguous."); *S.L. Nusbaum*, 227 Va. at 411-412, 316 S.E.2d at 736 ("language in a policy purporting to exclude certain events from coverage will be construed most strongly against the insurer."). Because MLM failed to make this exclusion clear and unambiguous that an "investor" is also an "owner," "manager," or otherwise "in control" of the business enterprise, the ambiguity must be construed in favor of the Insureds, and not MLM. *See United Servs. Auto. Ass'n. v. Webb*, 235 Va. 655, 657, 369 S.E.2d 196, 198 (1988) ("because insurance policies are typically drafted by insurers, any ambiguous terms are "construe[d] in favor of coverage or indemnity and against a limitation of coverage."); *Bituminous Cas. Corp. v. Sheets*, 239 Va. 332, 336, 389 S.E.2d 696, 698 (1990) (in cases of doubt, the court will construe the policy language "in favor of that interpretation which affords coverage, rather than that which withholds it. Policy language purporting to exclude certain events from coverage will be construed most strongly against the insurer."); *S.L. Nusbaum*, 227 Va. at 412, 316 S.E.2d at 736 (holding that the insurer's contention that its policy exclusion for "property management" also included "lease negotiations," when in fact the exclusion was not defined to include, nor was it otherwise directed in the policy to include "lease negotiations," rendered the exclusion ambiguous and did not preclude coverage). As such, Exclusion 3 does not bar coverage for this reason either.

3. The Cases Relied Upon on MLM Are Inapposite

MLM cites to several cases in support of its contention that Exclusion 3 applies. However, none of the cases applies Virginia law. Moreover, all of the cases either contain different policy language or involve situations where the insured-attorney was also an owner or partner in the business enterprise, or maintained the requisite percentage of stock in the business enterprise to qualify as an owner under the applicable insurance policy. None of those conditions are applicable here and such cases are inapposite.

For instance, in *Coregis Ins. Co. v. LaRocca*, the exclusion specifically precluded coverage for a "partner" in the business entity. The exclusion at issue provided:

> G. any CLAIM arising out of or in connection with the conduct of any business enterprise other than the NAMED INSURED (including the ownership, maintenance or care of any property in connection therewith) which is owned by an INSURED or in which any INSURED is a ***partner***, or which is directly or indirectly controlled, operated or managed by any INSURED either individually or in a fiduciary capacity; ....

80 F. Supp. 2d 452, 454 (E.D. Pa. 1999) (emphasis added). Moreover, the insured-attorney also happened to be a named partner and owned 7.5% of the interest in the very real estate company that had made the claim against him.

Other cases on which MLM relies also concern policy language different from MLM's. *See Coregis Ins. Co. v. Bartos, et al.*, 37 F. Supp. 2d 391 (E.D. Pa. 1999); *Mt. Airy Ins. Co. v. Greenbaum*, 127 F.3d 15 (1st Cir. 1997); *Home Ins. Co. of Ind. v. Walsh*, 854 F. Supp. 458 (S.D. Tex. 1994); *cf Am. Guarantee & Liability Ins. Co. v. Timothy Keiter, P.A.*, 360 F. 3d 13, 16-20 (1st Cir. 2004) (a case on which MLM relies wherein the Court held that the professional liability insurer had a duty to defend because none of the operative terms of the business pursuits exclusion were alleged in the complaint).[6]

Continental Cas. Co. v. Moser, No. 4:05CV00979 JLH, 2006 WL 827319, *5-*6 (E.D. Ark. Mar. 29, 2006) and *Cont'l Cas. Co. v. Smith*, 243 F. Supp. 2d 576 (E.D. La. 2003) are equally inapposite. In each case, the insured-attorneys were also serving as the president of their respective companies and that fact precluded coverage under the professional liability policy. That too is very much different from the situation in this case.

Moreover, MLM's reliance on cases in which the court made factual determinations regarding whether the legal advice or the business arrangement may have been the proximate cause of the loss are not applicable to the duty to defend analysis under Virginia law. *See* MLM Br. at 16 (citing to *Potomac Ins. Co. v. McIntosh*, 167 Ariz. 30, 804 P.2d 759 (1990)). In fact, MLM conceded as much before the Fourth Circuit:

> [i]f it is not set forth in the pleadings so clearly that it's outside the policy, then we have a duty to defend because the duty to defend means that there is a potentiality based on the pleadings for coverage under the policy. And that is the start and end of the inquiry. We are not allowed, we are not permitted as a matter of law to go beyond that.

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[6] *See also Westport Ins. Co. v. Bayer,* 284 F.3d 489, 495 (3d Cir. 2002), in which the court distinguished *LaRocca* based on different language in the business enterprise exclusion — that is more akin to the language found in the MLM policy — and affirmed that the professional liability carrier must indemnify the insured-attorney for claims against him arising out of a failed investment scheme because "professional services" were alleged even though there may not have been actual attorney-client relationship between the insured and the underlying plaintiffs.

See Gerling Aff. Ex. A at 10. It follows that MLM's reliance on such cases in support of its contention that it has no defense obligation to its Insureds fails.

4. MLM Wrongly Conflates NTP with Telefind

MLM repeatedly attempts to include the allegations associated with NTP in the second and third amended complaints as proof that the business enterprise exclusion precludes coverage. However, that is not factually accurate nor permissible under Virginia law.

For instance, attempting to analogize the facts of this case to the *Mt. Airy* case, MLM contends that "[l]ike the underlying plaintiff in Mt. Airy, the [Ferguson] Plaintiffs assumed the role of passive investors, after the Wireless Email Patents were secured by NTP (the company formed and owned by the Insureds), ... the wrongdoing charged against the Insureds is the wrongful withholding of the [Ferguson] Plaintiffs' portion of the Blackberry Settlement proceeds by an Insured-controlled business entity, NTP. As such, the business enterprise exclusion must apply." MLM Br. at 22.

But that is a *non sequitur*. The allegations concerning the Insured's alleged advice to other investors in Telefind do not concern the Insureds' wholly different investment in NTP. As is clear from the *Ferguson* plaintiffs' allegations, NTP did not even exist at the time the Insureds allegedly rendered the advice and devised the legal strategy regarding the wireless email patents about which these plaintiffs complain. *See* Gerling Aff. Ex. B at ¶¶55-57 ("...according to Stout, a 'distinction' could be created under United States patent law between Telefind's paging technology ... and the Wireless Email Technology, which would be placed in a separate entity in order (Stout claimed) to protect [certain investors in Telefind] interest in the Wireless Email

Technology."); Ex. C at ¶¶58-60 (same); *see also* Gerling Aff. Ex. B at ¶68 ("In June 1992, … Stout … incorporated NTP, Inc. ….."); Ex. C at ¶71. As such, this argument cannot save MLM either.[7]

C. The Specific Entity Endorsement is Not Applicable

Perhaps recognizing the failure of its argument under Exclusion 3, MLM also relies on the Specific Entity Endorsement. This Endorsement excludes coverage for

> [a]ny CLAIM resulting from any act, error or omission arising out of rendering or failing to render PROFESSIONAL SERVICES to or on behalf of the following individual(s), business enterprise(s) or organization(s):
>
> NTP, Incorporated
>
> ***

Id. at Form MLM-48 (7-03). But there are no allegations asserted by NTP against the Insureds. Nor is there any allegation that the alleged advice of which the *Ferguson* plaintiffs complain was rendered to or on behalf of NTP. Indeed, as stated above, NTP was not even in existence at the time that the purported legal advice that the *Ferguson* plaintiffs allege has deprived them of any interest in the wireless email technology or related patents. *See* Gerling Aff. Ex. B at ¶68; Ex. C at ¶71. As such, MLM's reliance on this exclusion also fails.

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[7] MLM contends that the "business enterprise" — NTP, Inc.— does not need to be in existence for the business enterprise exclusion to apply. *See* MLM Br. at 21-23. But that is not supported by the language of the exclusion, which requires that the professional services must be rendered in connection with a business enterprise "owned," "managed" or "controlled", not "to be owned, managed or controlled at some unspecified time in the future." In any event, such a fanciful interpretation of the exclusion would render it, at best, ambiguous and therefore must be construed in favor of the Insureds. *See* above § III.B.2.

D. Late Notice As to Stout

Effectively conceding that it has a duty to defend the Antonelli law firm,[8] MLM argues that it should not be obligated to defend Stout based on late notice in connection with the second amended complaint. The argument fails as there is now a third amended complaint, which is now the operative complaint, and for which MLM cannot claim late notice.

In any event, there are genuine issues of material fact in connection with MLM's late notice contention concerning the second amended complaint that precludes summary judgment.[9] The length of Stout's purported delay, which even under MLM's theory can be no more than approximately 140 days, is *not* sufficient to be deemed unreasonable as a matter of law to bar coverage. *See, e.g., State Farm Mut. Auto Ins. Co.* v. Walton, 244 Va. 498, 505, 423 S.E.2d 188, 192 (1992) (two year delay unreasonable as a matter of law); *Vermont Mut. Ins. Co. v. Everette,* 875 F. Supp. 1181, 1187 (E.D. Va. 1995) (three year delay unreasonable as a matter of law); *Dan River Inc. v. Commercial Union Ins. Co.*, 227 Va. 485, 488, 317 S.E.2d 485, 490 (1984) (seven year delay unreasonable as a matter of law); *cf. Mapp,* 461 F. Supp. 2d at 458 (under the circumstances, two year delay was not unreasonable as a matter of law). As such, this fact alone bars summary judgment. *Nationwide Mut. Ins. Co. v. Boyd Corp.*, No. 3:09-CV-211-HEH, 2010 WL 331757, at *5-*6 (E.D. Va. Jan. 25, 2010) (the Court denied the insurer's motion for summary judgment as to late notice because the three-plus month delay was not unreasonable as a matter of law and genuine issues of material fact remained for which discovery needed to be had, thereby requiring a bench trial on that issue).

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[8] By contending that Stout should have given earlier notice to MLM of the *Ferguson* action because there were allegations of "professional service" covered by its policy in at least the first amended complaint, MLM concedes that it has a defense obligation to the Antonelli law firm.

[9] Because the Antonelli law firm, and its partners, including Stout, are named insureds under the MLM policy, MLM's contention that notice of the *Ferguson* action was only on the part of the Antonelli law firm and not Stout is without merit. *See* Swirling Aff. at ¶¶2-3.

Moreover, it is equally true that MLM must demonstrate that Stout's alleged late notice was "substantial and material" in order to succeed on its contention that coverage to Stout is barred by late notice. *See N. River Ins. Co. of N.Y. v. Gourdine*, 205 Va. 57, 63, 135 S.E.2d 120, 124 (1964) (insured's failure to promptly forward first suit papers was not a substantial violation to render the policy void where insured promptly forwarded papers in second suit); *see Mapp*, 461 F. Supp. 2d at 452 (the insurer must prove that the insured's failure to notify was a "substantial and material" breach) (citations omitted); *Boyd Corp., supra,* (the complexity of the case is a factor the court must consider when entertaining the issue of late notice). There are three factors that bear upon materiality: (1) the reasonableness of the delayed notice under the circumstances, (2) the amount of prejudice suffered by the insurer as a result of the delay, and (3) the length of time that elapsed before notice was given. *Gourdine*, 205 Va. at 63, 135 S.E.2d at 124. As such, there are plainly factual issues that can only be uncovered by examining issues outside the complaint — precisely the inquiry that MLM argued to the Fourth Circuit was not permitted. *See* Gerling Aff. Ex. A at 10; *Capitol Envtl.*, 536 F. Supp. 2d at 642, fn. 19 (insurer is not permitted to look outside the complaint to defeat its defense obligations).[10] As such, for this reason as well, MLM cannot demonstrate late notice and its claim for summary judgment fails.

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[10] For instance, the Insureds' must be permitted to take discovery concerning MLM's contention that Stout's purported late notice caused prejudice by "creating additional burdens in attempting to monitor and determine the reasonableness and necessity of fees

IV. Conclusion

For the reasons stated above and in the Insureds' Motion for Summary Judgment, MLM's motion for summary judgment should be denied and a declaration entered finding that MLM has a duty to defend its Insureds.

Dated: April 30, 2010

Respectfully submitted,

/s/

Brian J. Gerling (VSB No. 75817)
Email: bgerling@hunton.com
Lon A. Berk (VSB No. 46516)
(*pro hac vice*)
Email: lberk@hunton.com
HUNTON & WILLIAMS LLP
1751 Pinnacle Drive, Suite 1700
McLean, Virginia 22102
Telephone: (703) 714-7400
Facsimile: (703) 918-4050

Counsel for Defendants
Antonelli, Terry, Stout & Kraus, LLP and
Donald E. Stout, Esq.

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incurred on behalf of the insured defendants under the Policy." *See* MLM Br. at 29 fn. 13. The only reason that MLM must examine defense counsel invoices is because it wrongfully refused to defend its Insureds against claims asserted in the *Ferguson* action that are unequivocally covered under its Policy.

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of April 2010, I will cause to be filed with the Clerk of the Court who in turn will electronically file the signed Consent Order using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

Danny M. Howell, Esq.
Email: dhowell@sandsanderson.com
Michael T. Marr, Esq.
Email: mmarr@sandsanderson.com
SANDS ANDERSON MARKS & MILLER
1497 Chain Bridge Road
Suite 202
McLean, Virginia 22101

Counsel for Plaintiff
Minnesota Lawyers Mutual Insurance Company

/s/
Brian J. Gerling (VSB No. 75817)
Email: bgerling@hunton.com
Lon A. Berk (VSB No. 46516)
(*pro hac vice*)
Email: lberk@hunton.com
HUNTON & WILLIAMS LLP
1751 Pinnacle Drive, Suite 1700
McLean, Virginia 22102
Telephone: (703) 714-7400
Facsimile: (703) 918-4050

Counsel for Defendants
Antonelli, Terry, Stout & Kraus, LLP
and
Donald E. Stout, Esq.